SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

FURNESS, WITHY & COMPANY, LIMITED
(Respondent-Appellant),
Petitioner

AGAINST

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, *et al.* (Libellants-Appellees),
Respondents

And 14 other suits

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Furness, Withy & Company, Limited, respectfully shows as follows:

On February 2, 1912, the petitioner's steamship *Pomaron* came into collision off the coast of Virginia with the Hamburg-American Line steamship *Alleghany*. The *Alleghany* sank and with its entire cargo became a total loss.

The owners of cargo on the *Alleghany* and their insurers filed libels *in personam* against the petitioner in the

United States District Court for the Southern District of New York. In some of the libels the Hamburg-American Line was joined as a party respondent, but limitation proceedings were instituted by that Company and, accordingly, further proceedings in this suit against it ceased. In the limitation proceedings instituted by the Hamburg-American Line it admitted its liability and upon paying into Court a small amount of freight money secured a decree relieving it from all further liability.

The suits against your petitioner were proceeded with in the District Court and resulted in the entry of a decree against it for $172,029.81 (Record, pp. 270–7). The opinion of the District Judge (Learned Hand, *J.*) is found at pp. 247–263 of the Record. Your petitioner appealed to the Circuit Court of Appeals which affirmed the decree of the District Court. The opinion is found at pp. 287–298 of the Record, and is reported in 215 Fed. Rep. 859.

Facts

The *Pomaron*, a small British steamer, bound from Baltimore, Maryland, to Leith, Scotland, was on an easterly course and sighted the *Alleghany* on her port hand about 10 or 12 miles distant. The *Alleghany* was on a southerly course, bound from New York to the West Indies. In this situation the *Pomaron* was the privileged vessel, and it was the duty of the *Alleghany* to keep out of her way. Both vessels were going at full speed,—the *Pomaron* making 9 knots an hour, and the *Alleghany* 11-1/2 knots. It was broad daylight, and the weather was absolutely clear. For three-quarters of an hour the vessels approached each other without change of course. As it afterwards transpired, no one on the *Alleghany* saw the *Pomaron* during this entire period. The only

man on the bridge was the quartermaster at the wheel and his view to starboard, from which direction the *Pomaron* was approaching, was cut off by a wind shield. The officer who should have been on the bridge was in the chart room making calculations from his observations.

The chief officer of the *Pomaron*, who was on the bridge, kept close watch upon the *Alleghany* during all the time that the two vessels were approaching each other. He was unable to see any sign of life on the *Alleghany*.

When the vessels were about a mile apart, the chief officer of the *Pomaron* blew a blast upon the whistle in order to attract the attention of the *Alleghany*, and at the same time he ordered the helmsman to port a little. This resulted in the *Pomaron* going off her course about a point to the southward, thus giving the *Alleghany* a little more clearance (fol. 464).

The blast of the *Pomaron's* whistle brought the first officer of the *Alleghany* out of his room and, seeing the *Pomaron* for the first time, he blew two blasts, put his helm hard ~~aport~~ starboard, and his engine telegraph at full speed ahead twice (*Alleghany's* Log, 734–5).

The *Alleghany's* first officer thus described the situation (711):

"I omitted during a period of about three-quarters of an hour to keep a lookout to starboard, and therefore never noticed the *Pomaron* crossing my course until the latter gave a signal to keep clear and had already approached so near that a collision was unavoidable. There was no lookout man at the time and the steersman's lookout, to starboad, was blocked by a wind screen. For a long period of time I neglected to keep a lookout and therefore first saw the crossing steamer *Pomaron* only at the last moment."

As soon as the *Alleghany* blew two blasts, which indicated that she was directing her course to port and attempting to cross the *Pomaron's* bow, the chief officer of the *Pomaron* reversed his engines full speed and ordered the helm hard aport in a last effort to escape collision or minimize the blow, but collision was inevitable, and the *Pomaron's* stem struck the *Alleghany's* starboard quarter about 100 feet from the stern, cutting into her so that in a few hours she sank.

" That the negligence of the *Alleghany* was inexcusable and even unparalleled, seemed to be admitted."

The officer in command

" had no idea that there was any vessel anywhere in his vicinity. And for three-quarters of an hour prior to the collision there was no lookout " (Opinion of Circuit Court of Appeals, Rec., p. 295; 215 Fed. Rep. 865).

Opinion of the District Court

Notwithstanding the gross and unparalleled negligence of the *Alleghany*, the District Judge felt compelled on the authority of *The Pennsylvania*, 19 Wallace, 125, to condemn the *Pomaron* also for porting her helm.

He reached this result with extreme reluctance and only because, under the interpretation which he placed upon the decision of this Court in *The Pennsylvania*, he could see no escape from such an unjust result. As he said:

"I have already said that the result seems to me extremely inequitable and I should be glad if an appellate court could find otherwise, but while the holding-on ship is charged with the burden of proof, I can see no alternative. The case is one which shows the necessity for the proposed new rule which will not hold each ship *in solido*, but will apportion liability according to fault. Had that been open to me, I should have attributed a very small

fraction of blame indeed to the *Pomaron*. As it is, under what I cannot help calling a very mechanical and arbitrary rule of law, I see no escape from assessing this ship with the full loss for a trifling violation of the rule, for it remains true, however we may regret the result, that only unfounded speculation can justify us in saying that the violation could not have produced the collision" (787–9).

Opinion of the Circuit Court of Appeals

The Circuit Court of Appeals agreed with the District Court that under the rule laid down in *The Pennsylvania*,

"The burden of proof rests upon the *Pomaron* to show that the fault she committed could not have been one of the causes of the collision,"

and that

"Whether the collision would or would not have occurred if the *Pomaron* had held her course and speed cannot now possibly be determined because of the doubt which exists as to the exact bearing of the *Alleghany* from the *Pomaron* at the time" (Rec., p. 293; 215 Fed. Rep. 863).

It being impossible to establish with certainty what would have happened if the *Pomaron* had not ported slightly, the Court concluded that the *Pomaron* had not sustained the burden which rested upon her and, therefore, affirmed the decree of the District Court. The Court also referred to the utterly inexcusable character of the disaster, and added:

"It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame" (Rec., pp. 294-5; 215 Fed. Rep. 865).

Apparently, therefore, it was the opinion of the Circuit Court of Appeals that where statutory fault is charged the rule so often laid down by this Court, that in case of gross fault on the part of one vessel any doubts regarding the conduct of the other vessel should be resolved in her favor, does not apply. Certainly, unless the distinction thus suggested is sound, no case has ever better merited the application of the rule expressed by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409:

> " Indeed, so gross was the fault of the *Umbria* in this connection, that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, and the *Ludvig Holberg*, 167 U. S. 60, 71, that any doubts regarding the management of the other vessel or the contribution of her faults to the collision should be resolved in her favor."

When the faults of the *Umbria* and of the *Alleghany* are compared, the fault of the *Umbria*, which this Court considered was gross, appears as but a venial error.

Questions Presented for the Consideration of this Court

1. Under the rule of *The Pennsylvauia*, 19 Wallace, 125, is it sufficient for a vessel charged with a statutory violation to show that the fault did not contribute to the disaster, or must she also show that it could not have done so?

2. Does the burden rest upon a vessel charged with a statutory violation to show that the disaster would have occurred irrespective of any action or inaction on her part?

3. Is it necessary to show that the statutory violation contributed to the disaster, or may the "but for" rule be relied upon to establish liability?

4. Is the rule that in case of gross fault on the part of one vessel any doubts regarding the management of the other vessel or the contribution of her faults, if any, to the collision should be resolved in her favor, inapplicable where the fault charged is a statutory violation?

5. Is the privileged vessel justified in changing her course when there is a distinct indication that the burdened vessel is about to fail in her duty?

The Pennsylvania (*supra*) was decided by this Court in 1873. It lays down a salutary rule, which has been applied in very many cases which have since arisen. In this case, however, it has been carried to such an extent as almost to

"make the vessel guilty of the infringement a sort of outlaw of the seas,"

as was said by the Privy Council in *The Fanny M. Carvill*, 13 App. Cas. 455, 459. The rule in regard to statutory violations in England was established by statute. The severity of this statute the English courts found themselves forced to modify by construction, but even this modification was found insufficient to prevent injustice, and by Section 4 of the Maritime Conventions Act of 1911, passed in order to give effect to the International Convention on Collisions signed at Brussels in 1910, the law was changed so that a vessel charged with statutory violation need only show that the breach did not in fact contribute to the collision. Your petitioner believes that the law

of the United States is the same as that of England since the Maritime Conventions Act of 1911, and that the Circuit Court of Appeals erred in giving a contrary construction to the decision of this Court in *The Pennsylvania.*

This Court did not in that case intend to lay down the "could-not" rule, but only the "did-not" rule, which was then in force in England as shown by the case of *The Fenham*, cited in the opinion. All that this Court intended was to require positive proof that the fault did not in fact cause the disaster; mere possibility or probability was insufficient. But it never intended to require in addition to such positive proof evidence that the fault could not have caused the disaster. The "could not" rule, even in England, was created by statute subsequent to the decision of *The Pennsylvania* and has now been abolished there.

Although the purpose of this Court in *The Pennsylvania* would seem not to be ambiguous, much confusion has resulted in the lower courts over whether this Court meant to say "did not" or "could not." Besides the decision of the Circuit Court of Appeals for the Second Circuit in this case, the decision of the Circuit Court of Appeals for the Sixth Circuit in *Hawgood Transit Co.* v. *Mesaba S. S. Co.*, 166 Fed. Rep. 697, considers the rule of *The Pennsylvania* as "could not." It is there said (702):

> "The fact that a ship was at the time of collision in actual violation of a statutory rule designed to prevent collisions throws the burden upon her to show that such violation could not have contributed to the collision" (citing *The Pennsylvania* and other cases).

On the other hand, in the case of *Gring* v. *Bensten*, decided by the Circuit Court of Appeals for the Fourth

Circuit, September 8, 1914 (apparently not yet reported), a copy of the opinion in which is annexed to this petition, that Court held that a vessel charged with a statutory fault, in being out of the course prescribed by the rules, need only show by a preponderance of testimony that her fault did not contribute to the collision.

An interesting illustration of the confusion resulting from the different views of the true rule of *The Pennsylvania* is shown by the case of *Prince* v. *Eastern S S. Co.*, 109 Me. 395.

In view of this confusion as to the true rule in cases of statutory fault, and as to the meaning of *The Pennsylvania;* and in view of the fact that by the Maritime Conventions Act of 1911 Great Britain has returned to the "did not" rule; and in view of the differences among the Circuit Courts of Appeals, your petitioner respectfully submits that it is highly desirable in the interest both of general navigation and international commerce that this Court should now review and settle once for all the important questions presented.

The fifth question calls for an interpretation of the "Special Circumstance Rule." The navigating officer of the *Alleghany* was absent from the bridge, there was no lookout and the wheelman was prevented by a wind shield from seeing anything in the direction from which the *Pomaron* was approaching. The navigating officer of the *Pomaron* was unable to see anyone on the *Alleghany's* bridge, and as there was no indication whatever that the *Alleghany* was changing her course, but, on the contrary, every indication that she was not, it was manifest that there would be a collision unless someone did something (462, 534–5). In this condition of affairs, Article 27 of the International Regulations,

entitled "General Prudential Rule," was clearly applicable. That rule provides:

"In obeying and construing these rules due regard shall be had to all dangers of collision and to all special circumstances which shall render a departure from the above rules necessary in order to avoid immediate danger."

The Circuit Court of Appeals refused to excuse the *Pomaron* under this rule because the navigating officer of the *Pomaron* testified, in answer to the question:

"Q. In order to get the matter quite plain on the record, will you tell us when it was in your judgment the circumstances had developed so that collision became unavoidable unless you did something?"

"A. Really not until the *Alleghany* had given me two blasts of the whistle" (Rec., p. 291; 215 Fed. Rep. 862).

The decision of the Circuit Court of Appeals results in the laying down of a rule for navigators that the privileged vessel must hold her course and speed up to the very moment that collision becomes inevitable unless action is taken by the burdened vessel, and allows no leeway whatever for the reasonable exercise of discretion by a navigating officer in a situation which has been well described as "one of the most difficult tasks imposed upon the seaman by the law," Marsden on Collisions, 6th ed., page 413.

The rule laid down by this Court in *The Delaware*, 161 U. S. 459, 469, is as follows:

"The cases of *The Britannia*, 153 U. S. 130, and *The Northfield*, 154 U. S. 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty."

As this Court pointed out in that case, this rule is of the utmost importance, but it is believed that it is of no less importance that navigators should not be bound by a

harsh and arbitrary interpretation of the rule which will prevent the exercise of the judgment and discretion which Article 27 was intended to provide for and the necessity of which is recognized by all. The exception pointed out in the quotation from *The Delaware*, "some distinct indication that she is about to fail in her duty", was made advisedly, and is of great practical importance. The decision of the Circuit Court of Appeals in effect nullifies this exception.

In the interest of safe navigation at sea, it is submitted that this Court should review a decision of the Circuit Court of Appeals which holds a navigator at fault for a trifling departure from Article 21 occurring at a time when the two vessels had approached from a distance of ten miles apart to a distance of not more than one mile apart without any change of course by the burdened vessel and when the navigating officer of the privileged vessel not only had good ground to believe that the burdened vessel was about to fail in her duty but when the real fact was that the burdened vessel was not even aware of the presence of the privileged vessel.

Your petitioner will present, in connection with this petition, a brief discussing more fully the contentions above stated with citation of authorities.

WHEREFORE your petitioner prays that this Honorable Court will cause a writ of *certiorari* to be issued requiring the United States Circuit Court of Appeals for the Second Circuit to certify the record herein so that this Court may act thereon as of right and according to law ought to be done.

And your petitioner will ever pray.

FURNESS, WITHY & COMPANY, Limited,
By BURLINGHAM, MONTGOMERY & BEECHER,
its Proctors

STATE OF NEW YORK, }
County of New York, } ss:

CHARLES C. BURLINGHAM, being duly sworn, deposes and says: That he is one of the proctors for the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief; that the reason why this verification is not made by the petitioner is that the petitioner is not within this District, and deponent is its proctor and familiar with the facts stated in the petition.

CHARLES C. BURLINGHAM.

Sworn to before me, this }
9th day of April, 1915. }

ROSCOE H. HUPPER,
[SEAL] Notary Public,
New York Co., No. 1621.

I HEREBY CERTIFY that I have examined the foregoing petition and that in my opinion the same is well founded and is entitled to the favorable consideration of this Court.

Dated, New York, April 9, 1915.

NORMAN B. BEECHER.

SIRS:

TAKE NOTICE that the foregoing petition for a writ of *certiorari* will be presented to the Supreme Court of the United States on Monday, April 12th, 1915.

Dated, New York, April 9, 1915.

BURLINGHAM, MONTGOMERY AND BEECHER,
Proctors for Petitioner.

To

MESSRS. CONVERS & KIRLIN,
Proctors for Yang-Tsze Insurance Association, Ltd., *et al.*, and Nord-Deutsche Insurance Co., *et al.*

MESSRS. KNEELAND, HARISON & HEWITT,
Proctors for Federal Insurance Co. *et al.*

MESSRS. BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for Walter Oloffson, *et al.*; M. H. Silvera & Hazan & Co.

MESSRS. WILLIAMS & STEVENSON,
Proctors for Boston Insurance Co.

MESSRS. HARRINGTON, BIGHAM & ENGLAR,
Proctors for Walter Despard, Eugene J. F. Coleman, Marshall K. Weidensaul, Francis W. Van Praag, Orton G. Orr, Laura Moore and Louis Bertschmann.

H. SNOWDEN MARSHALL, ESQ.,
Proctor for United States of America.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 1245

CHARLES GRING, Claimant of Steam Tug "*Curtin*," Appellant

versus

WILLIAM S. BENSTEN, Appellee

APPEAL from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued May 11, 1914. Decided September 8, 1914.)

Before PRITCHARD and WOODS, Circuit Judges

RALPH H. RIDDLEBERGER (RIDDLEBERGER and ROPER on brief), for appellant, and R. H. HUGHES, Jr., (HUGHES, LITTLE and SEAWELL on brief), for appellee.

WOODS, *Circuit Judge:*

On 18 December, 1911, the gasoline launch *Cecilia* was going up the Elizabeth River from Hampton Roads to Norfolk. The tug *Curtin* was coming down the river on the south or Portsmouth side of the river near the middle of the stream on its way to Pinner's Point. The tug *Pinner's Point* with a barge alongside was crossing the river from Pinner's Point to Fort Norfolk. The *Cecilia* and the *Curtin* collided astern the *Pinner's Point* with the result that the *Cecilia* was sunk. The District Court held the *Curtin* entirely at fault and adjudged that William S. Bensten, owner of the *Cecilia*, should recover of the

Curtin and its owners fifteen hundred and sixty-six dollars and fifty-two cents.

There is no substantial difference as to the law. While the testimony in its details is irreconciliable and confusing, we think the controlling fact is established by the preponderance of the evidence. The witnesses differ somewhat as to the precise point of collision, but they agree that it occurred near mid-stream at about 5:45 in the afternoon.

The master of the *Cecilia* admits hearing two whistles from the *Pinner's Point*, and the answer of two whistles from another vessel which turned out to be the *Curtin*, indicating the intention of the answering vessel to pass astern of the *Pinner's Point*.

The fact that the master of the *Cecilia* held his course up and gradually across the stream and astern of the *Pinner's Point* without giving any signal and with knowledge from the signal of the *Curtin* that a down-going vessel was about to pass astern of the *Pinner's Point*, would be fatal to his claim of exemption from blame, if this course of conduct contributed as a proximate cause to the collision. But we think the preponderating evidence shows that it did not. The master of the *Cecilia* testified that he did not signal the *Pinner's Point* because she was so far away that a signal was unnecessary. The master of the *Norfolk* and the master of the *Pinner's Point*, both impartial witnesses, corroborate his statement that the *Cecilia* and the *Curtin* were showing green to green and would have passed each other safely but for the sudden change of course of the *Curtin* toward the *Cecilia*, after the *Pinner's Point* had passed.

There was evidence that the *Cecilia* was out of the course prescribed by the rules, and this together with the signal of the *Curtin* might well be held to impose upon

the *Cecilia* the burden of keeping out of the way of the *Curtin*. Assuming that she was bound to keep out of the course of the *Curtin*, the evidence that there was no danger to either vessel until the *Curtin* changed her course tends to show that she discharged this duty—that she did nothing which put either vessel in danger, and that the cause of the collision was the *Curtin's* change of course. Singleton, the mate of the *Curtin*, who was navigating her is alone in his testimony that the collision was caused by the *Cecilia* changing her course and trying to cross his bow, and that the master of the *Cecilia* when taken on his vessel and asked his reason for the change did not deny it.

Acts of negligence which do not contribute to the accident as a proximate cause do not render a ship liable, even under the American as distinguished from the English rule of liability. *The Oregon*, 158 U. S. 186; *The City of Macon*, 121 Fed. 686; *The Lord O'Neill*, 66 Fed. 77; Marsden on Collisions at Sea (6th Ed.) 14.

Whether negligence imputed is the proximate cause or merely collateral or immaterial is a question of fact, and where the conclusion of the District Court is not against the preponderance of the evidence it cannot be disturbed.

It seems clear beyond dispute that the proximate cause of the collision was the negligent change of course by one or the other of the vessels. Enough of the evidence has been set out to show that the preponderance supports the finding of the District Judge that the courses of the two vessels were safe, that it was the *Curtin* that suddenly changed her course and struck the *Cecilia;* and that the danger of such a change would have been evident if the *Curtin* had had an adequate watch.

Affirmed.

SUPREME COURT OF THE UNITED STATES

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BRIEF FOR PETITIONER

FIRST POINT

THIS COURT DID NOT IN THE PENNSYLVANIA LAY DOWN THE RULE THAT A VESSEL GUILTY OF A STATUTORY VIOLATION MUST SHOW NOT ONLY THAT HER FAULT DID NOT CONTRIBUTE TO THE DISASTER, BUT ALSO THAT IT COULD NOT HAVE DONE SO. THE LOWER COURTS, THEREFORE, ERRED IN PLACING UPON THE POMARON THE BURDEN OF SHOWING THAT HER INITIAL PORTING COULD NOT HAVE CONTRIBUTED TO THE COLLISION, ENTIRELY IRRESPECTIVE OF WHETHER IT DID IN FACT CONTRIBUTE AND NOTWITHSTANDING THAT IT ACTUALLY DID NOT CONTRIBUTE.

The Pennsylvania was a case of collision in fog between the steamer *Pennsylvania* and the bark *Mary Troop*, which violated the statutory rule by ringing a bell

while under way instead of blowing a horn. This Court said, 19 Wall. 125, 136–7:

" But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. *In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.* Such a rule is necessary to enforce obedience to the mandate of the statute. In the case of *The Fenham*, the Lords of the Privy Council said, ' It is of the greatest possible importance, having regard to the admiralty regulations, and to the necessity of enforcing obedience to them, to lay down this rule; that if it is proved that any vessel has not shown lights, the burden lies upon her to show that her noncompliance with the regulations was not the cause of the collision.' In some cases it is possible to show this with entire certainty. In others it cannot be. The evidence in the present case leaves it uncertain whether if a foghorn had been blown on the bark, it would not have been heard sooner than the bell was heard, and thus earlier warning have been given to the steamer—seasonable warning to have enabled her to keep out of the way."

The language we have italicised is no authority for the proposition, so often sought to be adduced, that the violation of the statutory regulation imposes the burden of showing not merely that the violation did not contribute, but also that it could not have contributed to the disaster. This is apparent when we consider that the Court was there dealing with a case where it had not been shown that the fault did not in fact contribute to the disaster, but where only such a possibility or probability had been shown.

Neither the District Court nor the Circuit Court of Appeals expresses an opinion that the *Pomaron* contributed to the collision, having considered that point immaterial;

but their findings of fact sufficiently show that she did not contribute to the collision. Both courts rest with the finding that it is impossible to determine whether the collision would or would not have occurred if the *Pomaron* had held her course and speed.

The rule which this Court intended to lay down in *The Pennsylvania* is the rule which at that time was established by statute in England. At page 135 of this Court's opinion in *The Pennsylvania* the provisions of the British Merchant Shipping Act are stated, and the Court adds,

"Our own statute does not contain this provision expressed, but its meaning is the same."

The British Act referred to in the opinion in *The Pennsylvania* was 25 and 26 Vict., c. 63, s. 29. Under that Act a vessel guilty of a statutory violation needed only to show that her non-compliance with the regulations was not the cause of the collision. This appears clearly from *The Fenham*, L. R. 3 P. C. 212, which is cited in the opinion of this Court in *The Pennsylvania*. It is also shown by the discussion of the various British Acts in *The Khedive*, 5 App. Cas. 876, 891-3, and in *The Fanny M. Carvill*, 13 App. Cas. 454, 458-9. Of the effect of a similar provision in a slightly earlier Act, Pollock, *C. B.*, said in *Morrison* v. *General Steam Navigation Co.*, 8 Ex. 731, 738:

"And if it could be clearly made out that a vessel having no light had been run down by another, from sheer carelessness and negligence in not keeping a good lookout, we agree with Mr. Watson in thinking that in such a case the plaintiff would have had a right to compensation from the defendants."

It was not until after the decision in *The Fenham* that the British rule was changed by the enactment of 36 and

37 Vict., c. 85, s. 17, which was interpreted so as to impose upon the offending vessel the burden of showing not merely that her fault did not cause the disaster, but that it could not by any possibility have contributed to it. *The Fanny M. Carvill* (*supra*) at p. 459.

The history of the English legislation and cases decided thereunder is concisely stated in Marsden on Collisions, 6th Ed., pp. 39–42.

It is apparent, therefore, that the rule which the Circuit Court of Appeals has applied in this case was not the English rule in effect at the time of the decision in *The Pennsylvania* and with which this Court in *The Pennsylvania* agreed, but was the later English rule created by a subsequent Act whose policy has never been accepted in this country and which itself has now been abandoned in England.

This harsh statutory rule, the tendency of which was to make a vessel guilty of infringement of a regulation, "a sort of outlaw of the seas," as was said in *The Fanny M. Carvill* (*supra*) at p. 459, has now been repealed by Section 4 of the Maritime Conventions Act of 1911, 1 & 2 Geo. V., c. 57. In that case it was held that mere proof that the infringement of the regulation did not in point of fact contribute to the collision was inadmissible. That is also the real effect of the decision of the Circuit Court of Appeals in this case.

The effect of this repeal is stated in an introductory note to "The Maritime Conventions Act, 1911," by E. S. Roscoe and Helenus M. Robertson, London, 1912, page 10, as follows:

'The effect of the removal of this provision will be that a ship will only be held to be in fault for a breach of the collision regulations if, in the opinion of the Court,

such breach did *in fact* contribute to the collision, even though the circumstances did not make departure from the regulation in question necessary. It follows that any inquiry as to whether a breach of a regulation *might possibly* have contributed to a collision will be henceforth irrelevant and the law will now be unquestionably clearer."

Thus the English law now coincides with what we contend is our law as laid down in *The Pennsylvania*, and is the same as the English law at the time the case of *The Pennsylvania* arose. The harsh English statutory "could not" rule never had any warrant in our legislation or decisions and could have been applied by the Circuit Court of Appeals in this case only upon failure to observe that it was not the rule expressed in *The Fenham* on which the case of *The Pennsylvania* was decided. The District Court and the Circuit Court of Appeals clearly erred, therefore, in holding that the *Pomaron* must show that her porting could not have contributed to the collision.

SECOND POINT

THE POMARON DID NOT CONTRIBUTE TO THE COLLISION.

The Circuit Court of Appeals found it "difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care." But that a vessel making 11½ knots an hour, with no lookout and no officer on the bridge for three-quarters of an hour, might come into collision with another vessel, even without fault on the part of the other vessel, is, after all, perhaps, not so extraordinary.

The *Alleghany* had no officer on the bridge; she had no lookout. She was not even aware of the *Pomaron's* presence, and in consequence she made no attempt to perform the duty resting upon her of keeping out of the *Pomaron's* way. When she did discover the *Pomaron* her disregard of rules continued. In starboarding she violated Article 19 of the Regulations, the starboard-hand rule, and Article 22, which required that she should not cross ahead of the *Pomaron*. In continuing at full speed she violated Article 23. Everything she did was wrong. With respect to starboarding the District Judge said that the *Pomaron's* chief officer "was suddenly confronted with the very worst manœuvre which his adversary could execute" (784).

Any contributory negligence on the part of the *Pomaron* is expressly negatived by important considerations. Up to the time of the *Pomaron's* signal the *Alleghany* had not seen the *Pomaron* at all, and up to then both vessels had kept their course and speed. When that signal was given the chief officer of the *Alleghany* said that the collision was unavoidable:

> "I * * * never noticed the *Pomaron* crossing my course until the latter gave a signal to keep clear and had already approached so near that a collision was unavoidable" (711).

The master of the *Alleghany* said that when he saw the *Pomaron* she was "quite close to and a collision unavoidable" (708-9). The chief officer of the *Pomaron* when he ported saw that collision would occur unless he did something, if the *Alleghany* kept going as she was. Thus the judgment of three responsible mariners coincided as to the situation being fixed for collision when the *Pomaron* ported.

It is obvious that up to this time nothing that the *Pomaron* did affected the movements of the *Alleghany*. It is equally obvious that the signal of the *Pomaron*, accompanied by her porting, did not mislead the *Alleghany*. Under Article 28 of the International Regulations—in which no provision is made for alarm blasts (513)—one blast, such as the *Pomaron* gave (507), means "I am directing my course to starboard," and by porting the *Pomaron* did go to starboard. In this respect the case is entirely different from *The Pennsylvania*, where the bark gave a false signal, indicating that she was at rest, although she was in fact under way. 19 Wall., at p. 135. So far as the *Pomaron's* porting had any effect on the *Alleghany*, this case should therefore be considered as if the *Pomaron* had always been and remained on the course on which her porting placed her.

The *Pomaron's* porting did not embarrass the *Alleghany*, but on the contrary gave her more clearance (464). The Circuit Court of Appeals said that it was not free from doubt whether the *Alleghany* changed her course just before the collision. Her log shows, however, that the helm was put hard-a-starboard (735). Instead of starboarding a careful steamship officer instinctively ports his helm in an emergency. Either the *Alleghany* did not act at all with respect to the *Pomaron's* signal and change of course, of which she was promptly apprised, or, if she did act, she did the exact opposite of what was naturally to be expected. In either case the *Pomaron* is not chargeable with fault with respect to what the *Alleghany* did.

The *Alleghany* being thus apprised of all that the *Pomaron* did or intended, the situation as to contributory fault of the *Pomaron* is the same as that of the *Traverse*

in the case of *The Livingstone*, 113 Fed. Rep. 879, decided by the Circuit Court of Appeals for the Second Circuit. In that case the violation relied on was the absence of a red light on the *Traverse*. The Court said, pp. 882-3:

"He (the mate of the *Livingstone*) could see the *Traverse* while her signal notified him as plainly as any lights would have done that she was directing her course to starboard. Indeed, when pressed upon cross-examination, this witness admitted that the one whistle heard by him gave him all the information needed, and that the absence of the red light made no difference. * * *

"But it must be accepted that the position when the last signal sounded was one of safety, and that peril and disaster came thereafter only as the result of an amazing piece of stupidity in the navigation of the *Livingstone*. For this reason we cannot hold that failure by the *Traverse* to display a red light was a fault contributing to the disaster".

See also *Long Island R. R. Co.* v. *Killien*, 67 Fed. Rep. 365, 367.

What could the *Pomaron's* chief officer have done except to port? Collision being in his judgment imminent, he could not keep his course and speed. Had he stopped or reversed he would have thrown his vessel directly in front of the *Alleghany*, if at the last moment she ported her helm, as it was her duty to do (534, 562-3). Had he starboarded he would have turned the *Pomaron* directly towards the *Alleghany* (538–540, 543). This would thwart the *Alleghany* in every proper effort, for if she should port the two vessels would be coming together, and if she should stop and reverse, she would be directly across the *Pomaron's* bows. In *The Umbria*, 166 U. S. 404, 412, where the *Iberia* ported her helm upon hearing the *Umbria's* first whistle on her port bow, this Court said:

"We should be unwilling to state that it was necessarily a fault on her part to port her helm two points, the effect of which would be to give the *Umbria* more room."

And in the *Britannia*, 153 U. S. 130, reported in the Circuit Court in 42 Fed. Rep. 67, the *Beaconsfield*, though held at fault for stopping and backing across the bows of the *Britannia*, was not held at fault for porting, either in this Court or in the Courts below.

The District Judge evidently thought that it was essential for the *Pomaron* to show that the accident would have occurred had she not ported. He judged her by the "but for" rule, and the Circuit Court of Appeals pursued the same line of reasoning. The cases cited above, and *Railroad Co.* v. *Reeves*, 10 Wall. 176, sufficiently show, we believe, the error of such reasoning.

THIRD POINT

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE POMARON'S PORTING WAS NOT EXCUSED BY SPECIAL CIRCUMSTANCES.

Article 27 of the International Regulations requires that due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render departure from the rules necessary in order to avoid immediate danger. If by reason of the privileged vessel continuing to hold to the rule collision would be inevitable there is "immediate danger." In *The Delaware*, 161 U. S. 459, 468, this Court said:

"The weight of English, and, perhaps, of American authorities is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance' under Rule 24 'rendering a departure' from the rules 'necessary to avoid immediate danger.'"

The chief officer of the *Pomaron* when he ported had good reason to believe that the *Alleghany* would not take steps to keep out of his way because he could see nobody on her bridge, and it in fact turned out that no lookout in the direction of the *Pomaron* was being kept. The *Alleghany* had been rushing on for three-quarters of an an hour as blind to her own impending danger and that in which she was placing the *Pomaron* as if her helm had been lashed and all her crew dead. In these circumstances the *Pomaron* was not at liberty not to do something to avert the danger, although it was caused entirely by the *Alleghany's* fault.

In *The Delaware* (*supra*) this Court said (468):

"That her primary duty is to keep her course is beyond all controversy. It is expressly required by the 19th rule of the original International Code (Rev. Stat., sec. 4233), and of the 16th rule of the Revised Code of 1885, and doubtless applies *so long as there is nothing to indicute that the approaching steamer will not discharge her own obligation to keep out of the way.*" (Italics ours.)

The decision of the Circuit Court of Appeals denied the *Pomaron* the benefit of this most important qualification of the rule as it was applied in *The Delaware* and in *The Umbria*, 166 U. S. 404. We submit that its decision creates an impossible standard.

The judgment of the *Pomaron's* chief officer told him that unless he did something his vessel would be run down. He may not be judged too harshly for what he did at the last moment. In *The Huntsman*, 11 Asp. M. C. 601, the burdened vessel failed to keep out of the way because the officer in charge of the bridge was diverted by signalling. The *Rameses*, the privileged vessel, kept her course and speed until it appeared that the *Huntsman* was taking no measures to keep out of the way. She then slowed her

engines and sounded a long whistle to attract the attention of the *Huntsman*, and soon afterwards put her engines full speed astern and sounded three short blasts. The *Huntsman* continued on at high speed, apparently attempting to cross ahead of the *Rameses* and, swinging under a starboard helm, struck the stem of the *Rameses*. Various charges of fault were made against the *Rameses*, with respect to which Bargrave Deane, *J.*, said (608):

"Now, it is said: 'Your fault was that you did stop when you ought not to have done so, and you never reversed and yet gave a misleading three-blast signal.' Upon this question as to altering her speed by a vessel whose duty it is to keep it under Article 21, it is almost impossible to lay down any fixed rule. Good seamanship requires that in any case a time may come when the course or speed or both of a stand-on ship may and ought to be altered. The difficulty in such a case is to decide at what exact time such alteration not only may be but ought to be made. It is impossible, mathematically speaking, to fix that time—various ingredients come into the matter. * * * The burden of taking action and de parting from the rule is cast upon that officer, who has to determine when that point of departure ought to occur. *It must not be pressed too severely in any case. If the officer is carefully watching the movements of the other vessel and endeavoring to do his best to judge when the time shall arrive for him to act, it ought not to be made a complaint against him that he waited too long or he acted too soon.* * * * There was a manifest error of judgment as to the place in the intersecting courses where the vessels would relatively pass each other, with the result that instead of porting and passing under the stern of the *Rameses* the *Huntsman* kept her course and so did not keep clear of the *Rameses* * * *. In my opinion, if he (the officer in charge of the *Rameses*), had not slowed his engines in all probability he would have been cut in two by this big ship instead of hitting her amidships on the starboard side. I think the conduct of the officer of the *Rameses* was not blameworthy, but that he did the best he could in extremely difficult circumstances, and that the collision was far less serious than it would have been if he had kept his speed without slowing. * * * I think the *Huntsman* is alone to blame." (Italics ours.)

In the *Tempus* [1913] P. 166, the *Breiz Huel* and the *Tempus* were approaching on crossing courses, and the *Breiz Huel* sought at the last moment to cross ahead of the *Tempus*, the privileged vessel. Sir Samuel Evans said (171):

"It has been pointed out over and over again that the Court ought to be careful not to cast blame too readily upon a vessel which is placed in difficulty by another vessel. In the first place, the *Breiz Huel* gave no indication at all to the *Tempus* of what she was going to do, up to the very last. Therefore, the *Tempus* was left in doubt as to whether at the very last something would be done by the *Breiz Huel* to avoid collision. I have said that if the *Breiz Huel* had reversed her engines, about a minute or less before the collision, the collision would have been avoided, *and I do not think I ought to cast blame upon the Tempus if she expected, as no doubt she did, that up to that stage something would be done by the other vessel to carry out the obligations placed upon her.* The *Tempus*, in fact, almost immediately afterwards, did take action. She ported her helm to try to avoid the collision. She then, almost as one order, put her engines full speed astern and hard-a-ported. If she had reversed a little earlier than she did, I think it is very doubtful whether the collision would have been avoided." (Italics ours.)

FOURTH POINT

IN VIEW OF THE ALLEGHANY'S GROSS FAULT ANY DOUBTS AS TO THE POMARON'S NAVIGATION SHOULD HAVE BEEN RESOLVED IN HER FAVOR.

This Court has in many cases applied the rule that where the fault of one vessel is gross and sufficient of itself to account for the disaster, any doubts regarding the management of the other vessel or the contribution of her faults to the collision should be resolved in her favor. *The City of New York*, 147 U. S. 72, 85; *The*

Ludvig Holberg, 157 U. S. 60, 71; *The Umbria*, 166 U. S. 404, 409; *The Victory and The Plymothean*, 168 U. S. 410, 423. Had this rule been applied here it can hardly be doubted that the *Pomaron* would have been exonerated. No case, we believe, has ever come before the Courts where the negligence was so gross and inexcusable as that of the *Alleghany*.

This was fully recognized by the Circuit Court of Appeals, but instead of applying the well settled rule of this Court, which would have made it the duty of the Court to resolve any doubts in favor of the *Pomaron*, it proceeded to subject the charge of fault against the *Pomaron* to the closest scrutiny. The Court said:

> "To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame" (Rec., pp. 294–5; 215 Fed. Rep. 865).

The Circuit Court of Appeals does not place its reversal of the ordinary rule upon the ground that the fault charged against the *Pomaron* was a statutory violation. That Court, however, has frequently had occasion to apply the rule, as, for example, in *The Chicago*, 125 Fed. Rep, 712, and it can hardly be supposed that it was overlooked in deciding this case. Certainly, the point was urged upon the Court in the briefs submitted. It may, therefore, be fairly assumed that the Circuit Court of Appeals declined to apply the rule because of the nature of the fault charged against the *Pomaron*. While it is true that in all the cases in which this Court has laid down that rule, with the possible exception of *The Oregon*, 158 U. S. 186, the faults charged have not been statutory violations, it is submitted that there is no sound reason for failing to apply the rule in all cases. The same reason which

made it unfair and unjust to scrutinize too closely the management of the vessel which had already suffered from the gross misconduct of the other vessel in the cases cited, should lead to the same result where the fault charged is a statutory fault and the Court is asked to determine whether the violation in fact occurred, and whether it contributed to the disaster.

That the rule applies equally in all cases is indicated by the opinion of this Court in *The Oregon*, 158 U. S. 186. It was applied by the Circuit Court of Appeals for the Fourth Circuit in *The Lord O'Neill*, 66 Fed. Rep. 77, 80, and more recently by the same Circuit Court of Appeals in *Gring* v. *Bensten* (Appendix to Petition). This diversity of opinion on such an important subject between the Circuit Court of Appeals for the Second Circuit and the Circuit Court of Appeals for the Fourth Circuit, it is respectfully submitted, presents a proper ground for the exercise of the *writ of certiorari* by this Court.

LAST POINT

IT IS RESPECTFULLY SUBMITTED THAT THE WRIT OF CERTIORARI SHOULD BE GRANTED.

April, 1915.

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